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Nos. 99-5 & 99-29

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In the

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

ANTONIO J. MORRISON, *et al.*, *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3 Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause, federalism, and the constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in *Reno v. Condon*, *cert. granted*, 119 S. Ct. 1753 (1999).

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Respondents by further elucidating the inherent limitations on Congress' Article I authority under the Constitution. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

PLF participated as Amicus Curiae before this Court supporting the Petition for Writ of Certiorari, even though PLF favors affirmance. PLF's purpose in urging this Court to accept this case for review was based on its conviction that this case presents issues of grave import not only to PLF and to the many individuals who support PLF's efforts through charitable contributions, but to the public as a whole, because this case deals with the fundamental question of the constitutional underpinnings for federal government power and for the foundation and maintenance of a free republic. For these reasons, PLF respectfully submits this brief amicus curiae.

STATEMENT OF THE CASE

The federal Violence Against Women Act creates a private right of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Petitioner Christy Brzonkala brought a civil cause of action against the Respondents based upon this provision. Respondents defended the suit by arguing that Congress lacks authority under the Commerce Clause to create this federal right. Petitioner United States intervened to defend the statute, arguing that this statute was valid as an exercise of Congress' authority under either the Commerce Clause, or Section 5 of the Fourteenth Amendment. This brief addresses only the former issue.[2]

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[2] Amicus believes this statute is not valid under either the Commerce Clause or Section 5 of the Fourteenth Amendment. However, Amicus
(continued...)

Relying upon this Court's decision in *Lopez*, the district court held this law invalid as an exercise of the commerce power. *Brzonkala v. Virginia Polytechnic Institute*, 935 F. Supp. 779 (W.D. Va. 1996). On appeal before a panel of the Fourth Circuit, the Court of Appeals reversed in a split decision. *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). But on rehearing, in a 7-4 en banc decision, the Fourth Circuit affirmed the lower court and held that the federal government lacks authority under the Commerce Clause to enact the civil cause of action provision of the Violence Against Women Act. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). On September 28, 1999, this Court issued a Writ of Certiorari. *United States v. Morrison*, 68 U.S.L.W. 3177 (1999), *Brzonkala v. Morrison*, 68 U.S.L.W. 3177 (1999).

SUMMARY OF ARGUMENT

The federal Violence Against Women Act creates a new federal tort. It grants to private individuals the right to bring a civil cause of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). According to the Petitioners, Congress purportedly enacted this new federal tort pursuant to its power "[t]o regulate commerce . . . among the several states," or, alternatively, pursuant to its power under Section 5 of the Fourteenth Amendment.

As this Court has repeatedly pointed out, the power "to regulate commerce" is broad, but it is not so broad that it is without limit. *Lopez*, 514 U.S. at 564. Accordingly, in *United States v. Lopez*, this Court held that legislation enacted under the Commerce Clause would only be upheld where the statute regulated an activity that "substantially affects" interstate

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[2](...continued)
does not believe further argument is required on the issue of Section 5, because the thoughtful opinion of the Court below, as well as the briefs of other parties, adequately address this point.

commerce. *Id.* at 559. Here, Petitioners argue that the civil cause of action provision of the Violence Against Women Act is legitimate because violence against women, in the aggregate, "substantially affects" interstate commerce within the guidelines set out in *Lopez*.

In support of this position, the Petitioners take a cue from the statement in *Lopez* that Congress had neglected to make any findings that the conduct regulated in that case--possession of a firearm in a school zone--substantially affected interstate commerce. *Id.* at 562-63. They argue that, because Congress has found that gender-motivated violence affects interstate commerce, this Court should defer to Congress' judgment in this case. However, congressional findings do not displace this Court's duty to independently evaluate the legitimacy of congressional legislation. Indeed, Article III of the Constitution imbues this Court with the obligation to check the ambitions of Congress where it attempts to usurp powers not granted to it. Because Congress may not define the reach of its own authority, it is not sufficient that Congress made findings in this case. Instead, this Court must independently judge whether the statute regulates an activity that "substantially affects" interstate commerce.

As amply demonstrated by this case, however, the "substantially affects" standard by itself does not resolve this case. The standard does not provide any discernible line between legitimate and illegitimate exercises of federal power because it does not expressly require that the regulated activity be directly tied to interstate commerce in any way. Insofar as it leaves open the possibility that Congress may regulate intrastate noncommercial activity that has no direct impacts on any identified commerce, it is unworkable in practice, and, as applied, leads to dubious results. Consequently, this Court must devise a standard that leads to sensible results by requiring that the regulated activity be related to interstate commerce in some direct way. Congress' power to regulate under its commerce

authority should depend upon the character of the activity being regulated, the capacity of the actors engaged in the activity, the closeness of the relationship between the regulated activity and the targeted commerce, and whether the federal action adequately respects both the powers reserved to the states and the rights and powers reserved to individuals. By requiring congressional legislation to be tied directly to commerce in these ways, this Court can render judgments that remain truer to the constitutional intent and constitutional structure.

Further, where Congress seeks to regulate conduct, the test of constitutionality cannot depend merely upon "substantial effects," if those effects are indirect and abstract, and it cannot depend upon the aggregation of the effects of all similar activity, because the aggregated effects of *any* noncommercial activity invariably impact commerce. Indeed, in the present case, the alleged impacts to interstate commerce brought about by the aggregated effects of all gender-motivated violence are no more, and considerably less, than impacts brought about by violence in general, or, indeed, by crime as a general matter, or by divorce, death, or child-bearing. This Court should expressly disavow the "aggregation" theory as a means of establishing legitimacy under the Commerce Clause.

Finally, this Court should review Commerce Clause legislation with more searching scrutiny. In particular, this Court should give as much effect to Article I, Section 8's enumeration of the commerce power as it does to other provisions of the Constitution. The enumeration of powers was the primary mechanism by which the Framers of the Constitution sought to curb attempts by Congress to usurp the authority of the states. By deferring to the political branches in the interpretation and application of the Commerce Clause, this Court undermines the intent of the Framers and minimizes the scope of liberty carved out by the Constitution for the welfare of its citizens.

In light of the considerations outlined above, this Court should hold that the civil private right of action provided by the Violence Against Women Act is invalid under the Commerce Clause.

ARGUMENT

I

IN ASCERTAINING WHETHER A REGULATED ACTIVITY SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE, THIS COURT MUST APPLY ITS INDEPENDENT JUDGMENT WITHOUT REFERENCE TO CONGRESSIONAL FINDINGS

Article I, Section 8, of the United States Constitution enumerates 17 specific areas of authority granted to Congress by the people of the United States. Among these, "[t]he Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. According to the Petitioners, this power "[t]o regulate commerce . . . among the several states" implicitly embraces the authority to regulate gender-motivated violence. Congress, we are told, "amassed [evidence] . . . that violence against women has a substantial impact on interstate commerce," Brief for the United States at 6, and therefore, this statute legitimately falls within the political authority of our federal legislative branch.

But it cannot be seriously entertained in logic or common sense that gender-motivated violence constitutes actual interstate commerce. The constitutional enumeration simply cannot allow such a nonsensical interpretation. Yet, even under this Court's boldest commerce decision of recent years, *United States v. Lopez*, the failure of this statute to comport with any ordinary reading of the constitutional text does not necessarily constitute an infirmity. Rather, the test of legitimacy is, according to *Lopez*, whether the conduct in question "substantially affects" interstate commerce.

In *Lopez*, this Court outlined three ways in which legislation would meet the "substantial effects" standard: first, the Court would uphold the regulation of intrastate economic activity where the activity substantially affects interstate commerce; second, the Court would sustain statutes regulating intrastate noncommercial activity if the statute has a jurisdictional element to insure that each application of the statute has the requisite effect on interstate commerce; and last, the Court would uphold a statute if it met the "substantial effects" standard under an "independent evaluation of constitutionality under the Commerce Clause." *Id.* at 559-62. Under this last standard, the Court "of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect[s] on interstate commerce." *Id.* at 562.

It is clear from the outset that the present case does not fall into either the first or second of these "substantial effects" categories; that is, the private cause of action provision of the Violence Against Women Act neither regulates an economic activity nor contains a jurisdictional commerce element. Thus, *Lopez* leaves this Court--and the parties--with the bare question of whether the activity in question "substantially affects" interstate commerce under the Court's "independent evaluation."

Although this Court in *Lopez* did not state that congressional findings would be dispositive, it considered it significant that Congress had made no legislative findings that the conduct being regulated there--possession of a firearm in a school zone--substantially affected interstate commerce. *Id.* at 563. That language has led the Petitioners to argue strenuously that the diligence of Congress in making legislative findings, and the findings themselves, should be sufficient to satisfy the constitutional test in this case. *See* Brief for the United States at 5-11. That is, according to the Petitioners and their Amici, this case can be resolved simply by answering the

question: has Congress found that gender-motivated violence "substantially affects" interstate commerce?

But if the presence or lack of legislative findings disposes of this Court's "independent analysis" under the "substantial effects" test, the "test," insofar as it determines a *constitutional* grounding for sustaining congressional action, is meaningless. The judiciary, as a co-equal branch of government constitutionally obligated to decide the meaning of the Constitution, cannot allow Congress to define the scope of its own power, otherwise, the whole purpose of the constitutional structure of checks and balances is nullified. An "independent analysis," if it is to have any legitimacy at all, must in fact be independent--it cannot depend upon the judgment of Congress.

The very purpose of establishing three branches under the Constitution was to secure liberty by encouraging a tension among the legislative, executive, and judicial branches. James Madison, in The Federalist No. 44, pinpointed exactly the danger of judicial acquiescence to congressional overreaching:

> If it be asked, what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning? *I answer the same as if they should misconstrue or enlarge any other power vested in them . . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts*; and in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers.

The Federalist No. 44, at 230 (James Madison) (G. Wills ed., 1982) (emphasis added). Madison understood that the usurpation of illegitimate power by Congress would depend upon judicial sanctions of congressional misconduct. Thus,

deference to legislative judgment in constitutional matters accomplishes precisely the *opposite* of what the Framers had intended by separating government power among three coordinate branches. *See also* The Federalist No. 47, at 246 (James Madison) (G. Wills ed., 1982) (citing Montesquieu) ("'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul.'") Rather than serving as a protective barrier, the Court would instead conspire in the usurpation.

In The Federalist No. 78, Alexander Hamilton expressed his concurrence with Madison's views on this point by specifically stating that the Court's obligation, in the constitutional design, was to prevent congressional arrogations of illegitimate power:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*.

The Federalist No. 78, at 395 (Alexander Hamilton) (G. Wills ed., 1982) (former emphasis in original, latter emphasis added). Thus, judicial determinations of the proper scope of federal legislative power cannot depend upon the Legislature's conceptions of its own power. Rather, the proper scope of

federal legislative power must depend upon "first principles." *Lopez*, 514 U.S. at 552. Specifically, this Court must look to the Constitution itself and to the fundamental precept that Congress' powers are limited to those enumerated in Article I, Section 8, and further, it must acknowledge that those enumerations have some discernable and concrete import if the principle of enumerated powers is to have any meaning whatsoever.

As this Court opined almost two centuries ago:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). The answer this Court correctly gave to the question raised in *Marbury* was: to no purpose.

Article III of the Constitution imbues this Supreme Court with a constitutional authority separate and distinct from those powers granted to Congress and the Executive. For what purpose are judges and judicial power created if not to actually render judgment? The answer to this question, also asked in *Marbury*, is: for no purpose. *Id.* at 177-78. Accordingly, this Court must independently evaluate the legitimacy of the Violence Against Women Act as commerce legislation without reference to congressional findings.

II

AN INDEPENDENT EVALUATION OF THE COMMERCE POWER OUGHT TO REQUIRE THAT THE ACTIVITY BEING REGULATED IS TIED TO COMMERCE DIRECTLY; IT MAY NOT REACH CONDUCT THAT HAS TENUOUS CONNECTIONS TO INTERSTATE COMMERCE, PARTICULARLY WHERE THE CONDUCT IN QUESTION FALLS MORE PROPERLY WITHIN THE JURISDICTION OF STATE POLICE POWERS OR INDIVIDUAL AUTONOMY

A. Where Congress Purports to Regulate Under Its Commerce Power, the Court Must Look at the Character of the Activity or Party Being Regulated, the Connection Between the Activity and Interstate Commerce, and the Potential for Infringing upon Rights Reserved to the States or to Individuals

The judicial doctrines the lower courts have adopted in light of this Court's decision in *Lopez* have, unfortunately, failed to endow the Commerce Clause with any more meaning, as a matter of judicial interpretation, than it had prior to *Lopez*. With the single exception of the court below, the federal courts of appeals have repeatedly found that *Lopez* presents no barrier to upholding any manner of legislation as a valid exercise of the federal commerce power. *See, e.g., Solid Waste Agency of Northern Cook County (Solid Waste) v. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (migratory bird use justifies federal regulation of isolated wetlands); *National Association of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (impacts of biodiversity on commerce sustains federal regulation of insect habitat). The reason these courts have been unable to apply *Lopez* in any meaningful way is that, in *Lopez*, this Court did not articulate a standard of

constitutionality beyond the general prescription that federal enactments under the Commerce Clause may only reach activities that "substantially affect" interstate commerce.

The problem with the "substantially affects" standard is that it does not provide a framework by which a court can distinguish one activity from another in a way that lends substantive import to the phrase "[t]o regulate commerce . . . among the several states." Thus, under the standard, if Congress seeks to regulate interstate commerce in milk, it may as easily regulate the purchase, price, and interstate transport of milk as it may regulate the populace's home consumption of milk, because the latter activity affects interstate commerce in milk as substantially as the former. Yet the character of the activities differs greatly, and it can hardly be countenanced that the power "[t]o regulate commerce . . . among the several states" would properly include the power to dictate the private, noncommercial behavior of citizens in their own homes. Thus, while the "substantially affects" standard is useful, it does not provide a mechanism for drawing lines, let alone "bright" ones. This Court must devise a standard that leads not only to consistent results, but to *correct* results, and it must do so by applying to the word "commerce" some meaning that is faithful to its constitutional intent.

In viewing the full breadth of this Court's Commerce Clause jurisprudence, it becomes evident that there are four principle factors this Court considers when evaluating the legitimacy of federal commerce legislation. First, this Court has looked at the *character* of the activity being regulated--that is, whether the activity in question is itself commercial or noncommercial in nature. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971) (credit transactions). Second, this Court has looked at the *capacity* of the actors engaged in the activity; specifically, whether Congress is regulating the conduct of individuals when they are acting in a commercial capacity, rather than simply as individuals. *See, e.g., Katzenbach v. McClung*,

379 U.S. 294 (1964) (restaurant business purchasing goods in interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (motel business serving interstate travelers). Third, this Court has looked at the *closeness* of the relationship between the regulated activity and the interstate commerce targeted by the regulation. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (relationship between wheat produced and consumed on farm and the regulation of the volume of wheat moving in interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (relationship between wages and hours of employees and the shipment in interstate commerce of goods produced by those employees). Finally, this Court has considered *comity*: has Congress undermined or interfered with matters that have been regulated traditionally through state police powers or considered within the sphere of individual autonomy. *See Lopez*, 514 U.S. at 564 (criminal law and education traditionally within the sphere of state authority).

Though the interplay of these four factors may not necessarily yield fixed results for every court considering every piece of federal legislation, they surely indicate where Congress' powers are most and least justified. Where an analysis under all of these factors reveals direct connections to commerce without undue interference in state or private matters, congressional authority is unquestioned. But as the scale slides in the opposite direction, congressional authority becomes more doubtful or even nonexistent. Thus, in the example above, analysis under these factors would yield the result that Congress may not regulate one's home consumption of milk because the activity is noncommercial, the actor is not acting in a commercial capacity, the act of home consumption has an attenuated (though substantial) connection to interstate commerce in milk, and the activity falls within the protective sphere of individual discretionary conduct. Similarly, in *Lopez*, the conduct in question was beyond congressional authority because the possession of a gun in a school zone by Alfonso Lopez was

noncommercial, *id.* at 561, did not deal with commercial actors], *id.* at 549, was very tenuously related to interstate commerce, *id.* at 563-64, and fell within spheres of activity--criminal law and education--that were traditionally governed by state law, *id.* at 564.

Even the troubling decision in *Wickard v. Filburn* becomes comprehensible when these four factors are applied to the facts of that case. *Wickard*, it may be said, has stood for the proposition that, through the commerce power, Congress may regulate the consumption of produce grown on one's own land. But is that what this Court intended by that decision? The rationale of *Wickard*--that is, "[h]ome-grown wheat in this sense competes with wheat in commerce," and the production and consumption of wheat, in the aggregate, can have substantial effects on interstate commerce in wheat, *id.* at 128-29--applies equally well to an individual consuming apples grown on a lone tree in his own backyard. But it is unlikely that this Court would similarly uphold an attempt by Congress to regulate the latter activity even if Congress had arrived at the perfectly reliable conclusion that home-grown apples compete with commercially grown apples, and that the aggregate of all such apple consumption has a substantial effect on interstate commerce in apples. Rather, the particular facts of *Wickard* make the decision a little more--but only just--palatable: though the consumption of wheat is not a commercial activity,[3] Filburn was a commercial wheat farmer otherwise subject to the Agricultural Adjustments Act, *id.* at 114, and the sole purpose of the Act was to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages," *id.* at 115. Thus, Filburn's activity arguably met two of the four elements that justify commerce legislation: Filburn's capacity as a commercial farmer, and the closeness

[3] *But see Lopez*, 514 U.S. at 560, characterizing Filburn's conduct as an "economic activity" because he grew wheat as part of his commercial farming operation.

between the regulated activity and the interstate commerce in wheat targeted by the statute.

In essence, the four factors cited here are merely a distillation of the different elements this Court has employed when assessing the legitimacy of federal commerce legislation. Thus, where an activity being regulated was not commercial, such as sexual harassment, the Court has looked to a combination of the other factors to satisfy the test of constitutionality, *e.g.*, the fact that the harassment being regulated takes place in the context of employment. As a result, assessing Commerce Clause legislation by reference to these points respects the doctrine of *stare decisis* because it does not categorically disturb the prior pronouncements of this Court or otherwise upset settled expectations. At the same time, it preserves a sufficiently broad sphere in which Congress may regulate. But the primary virtue is that the application of these four components as a basis for determining whether a federal enactment meets the "substantially affects" test is that it ties the regulated activity to commerce, as well as respects the principles of enumerated powers and federalism. It is these considerations which are lacking in the bare "substantial effects" standard announced in *Lopez*. To the extent these factors supply a methodology by which courts can make an "independent evaluation" as to whether an activity "substantially affects" interstate commerce, they should be observed.

B. Gender-Motivated Violence Is Not Sufficiently Related to Interstate Commerce to Justify Federal Regulation Through the Commerce Clause

Once one views the legitimacy of federal commerce legislation by reference not only to whether the regulated activity "substantially affects" commerce, but by analysis of what activity, exactly, Congress is regulating and how Congress is attempting to achieve commercial ends, it is evident that the present statute does not pass muster.

The provision of the Violence Against Women Act that is being challenged purports to grant individuals a private civil right of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Even according to the Petitioners, this provision does not regulate a commercial activity: gender-motivated violence, of whatever character, is clearly not commercial or economic by nature. Further, the statute does not address itself to commercial actors--neither the aggressor nor the victim need be engaged in a commercial activity for the statute to apply. This leaves the legitimacy of the provision resting on two possible bases for justification as an exercise of the commerce power: the closeness of the connection between the regulated activity and impacts to interstate commerce, and whether the regulation refrains from interfering in matters more properly belonging within the sphere of state regulation. As shown below, analysis under both of these factors shows that the statute falls outside the bounds of legitimate commerce legislation.

The relationship between gender-motivated violence and effects on interstate commerce is highly attenuated--so much so that the Petitioners cannot identify a particular interstate commerce impact that Congress sought to regulate, much less show that a particular application of the statute has any effect on interstate commerce whatsoever. The United States cites a catalogue of unrelated interstate commerce effects: first, gender-motivated violence diminishes national productivity because its victims suffer physical and emotional injuries which may cause them to forego employment, miss work days, or lose productivity, and "[a] significant portion of those costs are borne by employers engaged in interstate commerce." Brief for the United States at 23-24 (citations omitted). Second, the government argues, the mere existence or frequency of such violence may discourage women, in particular, from taking jobs "in interstate business" if those jobs require employment at certain hours or in certain locations. *Id.* (citations omitted).

Third, gender-motivated violence may deter potential victims from traveling interstate, particularly by means of public transportation. *Id.* at 25. Fourth, such violence discourages victims or potential victims from transacting business in interstate commerce. *Id.* And finally, gender-motivated violence affects interstate commerce by increasing medical and other costs. *Id.*

Even granting the truth of these claims, this catalogue of interstate commerce impacts proves too much. That is, in order to state a claim under this statute, a plaintiff may not merely allege that a given defendant engaged in conduct constituting a crime of rape or other violent felony. Though it is not entirely clear what Congress meant, the statute explicitly states that it does not apply to "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender," 42 U.S.C. § 13981(e)--that is, acts "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender," 42 U.S.C. § 13981(d)(1). Thus, in the trial court, Ms. Brzonkala had to demonstrate that the alleged rape was directed at her by virtue of her sex, and was not directed at her in a more personal way. *Brzonkala*, 169 F.3d at 830.[4] As a result, the impacts described by the United States cannot possibly be laid at the doorstep of the conduct being regulated: the statistics cited by the government do not limit themselves to that subset of all rapes or violent crimes that are

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[4] As stated above, it is not clear what Congress meant by the "gender-motivated" requirement, particularly as it relates to the crime of rape. Unless a rapist can prove that he selects his victims indiscriminately with regard to sex, it is probably a crime that is, by definition, "due, at least in part, to an animus based on the victim's gender"--whether or not the victim is male or female. If that is true, every rape is a federal civil offense under the Violence Against Women Act. However, the courts below required something more.

"gender-motivated," but relate to all rapes and violent crimes against women, period.

And even if every incident of rape and domestic violence could be said to be "gender-motivated," on what basis does the United States, or Congress for that matter, presume that it is these crimes, alone, which cause the asserted impacts on commerce? For most of the impacts--the reluctance of women to take jobs that require unusual hours or unsavory locations; the reluctance of women to travel interstate; *etc.*--the likelihood of being a victim of a mugging or any other crime, whether or not violent or gender-motivated, is as probable a basis for the asserted impacts to commerce as the likelihood of being raped. As to medical costs, the increased costs brought about by physical *violence in any form and motivated by any sentiment* is surely staggering. Insofar as random violence is not only not unusual, but downright commonplace in some cities or neighborhoods, the recitation of these latter impacts as a justification under *Lopez'* "substantial effects" standard for the regulation of gender-motivated violence--and *only* gender-motivated violence--is indefensible.

But what is more telling about the recitation of these random impacts is that, even if these impacts may be proven to be "real" or even "substantial," they are extremely remote from the conduct being regulated. A given act of gender-motivated violence is as likely to have an impact on any one of these particular interstate commerce interests as on another, or on none at all. The impacts themselves are of an extremely general nature, and are utterly dependent upon the random reaction or demeanor of the victim or, as the case may be, the potential victim. Indeed, several of the impacts cited by the United States are not, strictly speaking, brought about by violence, much less gender-motivated violence, but by the *fear* of crime in general, whether or not it takes a violent form. Thus, in part, the United States is asserting that Congress may regulate an activity based upon the *potential* for the activity to substantially affect

interstate commerce--an avenue this Court expressly refused to pursue in *Lopez*. *See Lopez*, 514 U.S. at 564 (rejecting argument that Congress may regulate guns in a school zone because "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe").

That violence, and gender-motivated violence specifically, has some impact on commerce is unassailable, but it is also unassailable that the impacts of the regulated conduct are indeterminate. And they are indeterminate not so much because Congress did not do its homework, but because the impacts to commerce are random, abstract, remote, and, by their nature, imprecise. For example, the impact to interstate commerce that is caused by women refusing to take public transportation may be offset by the impact of women opting for private transportation, and the impact of women avoiding jobs that require unusual hours or unusual locations may be offset by the impacts of these same women who take jobs in safe locations at regular hours. But under the Petitioners' view, the *net effect* on commerce is not the relevant inquiry; rather, *any impact* may go into the calculation of "substantial effects." As a result, any conduct that may alter human behavior meets the Petitioners' test. In this case, in essence, the asserted impacts amount to no more than stating the obvious fact that crimes of violence in general, and the crime of rape in particular, are sure to affect the collective behavior of women (and everybody else, for that matter), and further, the collective behavior of women (and everyone else) has substantial effects on interstate commerce. But these impacts, however real or substantial as a general matter, are not sufficiently direct to enable Congress to regulate gender-motivated violence.

Finally, the statute fails constitutional muster because it intrudes--deeply--into matters that have traditionally been regulated by the states: rape and other acts of violence. Indeed, the statute allows a victim to bring a federal cause of action

against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). The statute further explains:

> (2) the term "crime of violence" means--
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981(d). In essence, this law makes it a federal civil offense to commit a state or federal crime, and subsection (2)(B) creates new civil law with respect to the treatment of married individuals (that is, for example, because some states do not recognize the crime of "rape" in the marital context, conduct that would not amount to a crime (or civil offense) in these states would become subject to civil liability under the federal law). Thus the statute, by its terms, recognizes the primacy of state law in the area of criminal law and domestic relations at the same time that it expressly overrides such laws.

The statute intrudes into matters reserved primarily to the state--specifically, criminal law and torts. *See Lopez*, 514 U.S. at 564 (noting that criminal law enforcement is an area "where

States historically have been sovereign"). But even more, the interference in state matters is particularly troubling in this case in that the statute purports to provide a *federal* civil remedy for criminal conduct defined by the *state* in which the conduct occurs. That is, because the federal law makes it a civil offense to commit a state felony, the meaning of this federal law differs from state to state depending on how states define their felonies. Thus, conduct that may be actionable in Utah may not be actionable in New York, and furthermore, even conduct that constitutes a felony under state law is recast under the federal law, depending upon whether a court believes that the felony constitutes a "crime of violence" within the meaning of the federal Act. *See, e.g., McCann v. Bryon L. Rosquist, D.C., P.C.*, 998 F. Supp. 1246 (D. Utah 1998); *Crisonino v. New York City Housing Authority*, 985 F. Supp. 385 (S.D.N.Y. 1997).

In one view, the federal statute's deference to state law could be interpreted as homage to the sovereignty of the states. However, the law itself proves the opposite: by casting the federal law to rest upon the body of the laws of 50 states, Congress has effectively reweighed and overruled state policy choices in the formulation of criminal and civil law by substituting its own views of better policy. That is, the states' criminal and tort laws have defined the punishment and liability associated with the regulated conduct according to policy choices weighed by their own state citizens. But the federal law reassigns the relative social and other costs of engaging in the conduct. In short, the states define the crimes, but the federal government defines the punishments. This constitutes a significant interference in state governance of criminal and civil law matters.

The private right of action created by the federal Violence Against Women Act does not regulate a commercial activity and does not regulate individuals acting in a commercial capacity. Further, the activity being regulated has nebulous connections to interstate commerce. Finally, the Act substantially interferes

in and undermines matters that have traditionally been within the province of state police powers. Because the Violence Against Women Act fails to satisfy the factors which justify an exercise of federal commerce authority, the Act is invalid under the Commerce Clause.

C. This Court Should Eschew Entirely the Notion That a Class of Noncommercial Activities May Be Aggregated to Establish a "Substantial Effect" on Interstate Commerce, Because It Invariably Leads to a Limitless Power

As demonstrated through examples above, the effects of any activity of any nature, if aggregated, can invariably be shown to demonstrate real and substantial impacts on interstate commerce. Indeed, depending upon how broadly the government casts the "activity" that is being regulated, the invocation of the aggregation principle announced in *Wickard*, 317 U.S. at 127-28, and repeated in cases such as *Perez*, 402 U.S. at 154 (aggregation of all extortionate credit transactions), and *United States v. Bass*, 404 U.S. 336, 345 (1971) (aggregation of all firearm possession by all convicted felons) can always be shown to "substantially affect" interstate commerce. But, in *Lopez*, this Court expressly rejected any theory under which it would be "difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564. Plainly, the aggregation principle is just such a theory.

For example, the lower courts have latched onto the aggregation principle as a life-preserver for all manner of dubious commerce legislation. Thus, in *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), the Second Circuit Court of Appeals found that federal law preempted municipal towing ordinances because,

> [g]iven that many cities are situated in close proximity to nearby states, e.g., Chicago, Philadelphia, Kansas City, and Washington, D.C., *it is reasonable to infer that municipal towing laws have, in the aggregate, a substantial effect on interstate commerce.* We, of course, defer to the legislative will where any rational basis may be discerned for finding a substantial effect on interstate commerce from a given activity.

Id. at 778 (emphasis added).

And in *NAHB*, the District of Columbia Circuit Court of Appeals upheld federal regulation of intrastate habitat for an insect by reaching the obvious, but numbingly hollow, conclusion:

> In the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.

NAHB, 130 F.3d at 1053-54.

The Seventh Circuit Court of Appeals has also found the aggregation principle particularly useful. In *Solid Waste*, the court upheld the federal regulation of isolated ponds based on the fact that such ponds were visited by migratory birds:

> [W]e find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Solid Waste, 191 F.3d at 850.

And in *United States v. Jones*, 178 F.3d 479, 481, *cert. granted*, 68 U.S.L.W. 3321 (1999), the Seventh Circuit upheld a conviction under the federal arson statute in the face of a

Commerce Clause challenge by looking at the aggregate effect of all arsons--despite the fact that the statute in question contained a jurisdictional element which, by definition, requires a "case-by-case inquiry." *Lopez*, 514 U.S. at 561.

Thus, in this case, it is hardly surprising that the Petitioners find it dispositive that, because they can cite statistics showing that incidents of rape and domestic violence, as a class, have effects on interstate commerce, the Violence Against Women Act is valid, regardless of the fact that the statute does not purport to regulate all rapes or all acts of violence.

The fact that statistics on rape and domestic violence, and the economic impacts of these activities, are so high may indicate that the problem is critical and that it is even "national" in scope, in the sense that it is not limited to particular geographic areas or particular states. But the fact that the problem is "national" does not make it any more commercial. Yet through the recitation of alarming and truly disgraceful statistics relating to modern life in this society, the Petitioners attempt to justify the federal enactment by showing that particular conduct engaged in--of whatever nature--can be aggregated to demonstrate real impacts upon the economy. But this is invariably the case if the conduct is common enough.

Under the aggregation theory, a noneconomic activity like throwing frisbees is unlikely to meet the "substantial effects" test if only 200 people engage in it, because even the combined acts of 200 people may not be enough to create "substantial effects." But if frisbee-throwing becomes all the rage, members of Congress may start talking about how the unregulated throwing of frisbees is having tremendous interstate commerce impacts on the sale and installation of windows. Yet the conduct in question does not somehow change its character; the only thing that has changed is the frequency of the conduct. Is this sufficient, as a matter of constitutional law, to bring an activity within the domain of the Commerce Clause?

Congress' *constitutional* authority *to regulate commerce* ought not depend solely upon the mere prevalence of conduct. That is, the grant of power in Article I, Section 8, Clause 3, reaches *commerce*, and all that term implies, but the meaning of that term cannot devolve simply upon whether conduct is so common that it can be said to constitute a "national" issue rather than a local one. Instead, it must depend upon whether the conduct being regulated is, more or less, *commercial*, if the Commerce Clause is to have any meaning at all. The "substantial effects" on which the Petitioners rely are effects that wax and wane with the effectiveness of state criminal and civil enforcement procedures or perhaps the moral and social values which dominate our culture. It is a peculiar power indeed if Congress' constitutional authority "to regulate commerce" may be triggered by events wholly unrelated to commerce.

The aggregation principle, sustained by this Court in *Lopez*, 514 U.S. at 561, and bolstered by this Court's reaffirmation in *Lopez* of its prior Commerce Clause cases such as *Wickard*, serves only to obfuscate any meaningful inquiry into the question of whether an activity that "substantially affects" interstate commerce remains true to the constitutional requirement that Congress may only regulate "commerce." Because the aggregation of any conduct can always produce "substantial effects" on interstate commerce, this Court should expressly disavow the aggregation principle as a means of determining whether federal legislation regulates an activity that "substantially affects" interstate commerce.

III

CONGRESSIONAL EXERCISES OF THE COMMERCE POWER SHOULD RECEIVE A MORE SEARCHING SCRUTINY FROM THIS COURT

In *Hodel v. Indiana*, 452 U.S. 314 (1981), this Court explained

> [a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Id. at 323-24.[5] Yet this Court has never adequately explained a doctrinal basis for deferring to Congress so completely in the interpretation and application of Congress' commerce powers while applying more exacting scrutiny to congressional enactments that offend other provisions of the Constitution.

For example, in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and later in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court had little trouble discerning that the Presentment Clause had some definitive meaning inherent in the constitutional text. Although members of this Court disagreed as to its substantive meaning, the majority of this Court did not entertain the notion that Congress was constitutionally entitled to interpret this clause co-equally with the judicial branch in a way that would suggest utter deference to congressional judgment. And, indeed, on the occasions in which this Court has been asked to rule on the validity of noncommerce legislation as legitimate exercises of power under other provisions of the Constitution, the decisions of this Court, though not without controversy, have been unhindered by the marked hesitation with which this Court has approached legislation purportedly enacted under the commerce power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997).

Of course, the most searching inquiries into constitutional legitimacy have centered upon congressional enactments which intrude upon rights protected by the Bill of Rights. *See, e.g.,*

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[5] As elaborated upon in Section II of this brief, the Violence Against Women Act would seem, on its face, to fail the second test.

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). Indeed, in *Lopez*, the concurring justices opined:

> The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.

Lopez, 514 U.S. at 579 (Kennedy, J., concurring). But, there is neither more nor less political judgment involved in congressional enactments under the Commerce Clause than in enactments that implicate rights protected by the Bill of Rights.

For example, notwithstanding political judgment, this Court has not hesitated to adhere to and apply the constitutional requirement that Congress observe the formalities of federalism memorialized in the Tenth and Eleventh Amendments, even though the strict boundaries between state and federal spheres of governance are not precisely defined in the Constitution. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240 (1999), *Printz v. United States*, 521 U.S. 898 (1997), *New York v. United States*, 505 U.S. 144 (1992). Yet, the concept of enumerated powers is surely as vital a part of our constitutional structure as the principle of federalism. Further, this Court has shown little trepidation when overturning the political judgments of state governments and state citizens, *see Romer v. Evans*, 517 U.S. 620 (1996), even where the asserted basis for this Court's decisions have little positive constitutional foundation, *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (liberty interests in right to abortion); *Griswold v. State of Connecticut*, 381 U.S. 479 (1965) (liberty interest in right of married couples to use contraceptives).

In The Federalist No. 84, Alexander Hamilton expounded upon the gravity of the distinction between the powers enumerated in Article I and the rights protected by the Bill of

Rights. He perceived that the greater threat to liberty existed in excesses of federal power:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? *I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.*

The Federalist No. 84, at 437 (Alexander Hamilton) (G. Wills ed., 1982) (emphasis added). Thus, to contend that this Court has a greater role in curbing federal incursions into the rights protected by the Bill of Rights than in curbing congressional excesses is to prove the validity of Hamilton's fears: Article I, Section 8, ceases being an enumeration of powers; rather, the Bill of Rights turns into an enumeration of liberties.

If this Court continues to adopt a deferential view toward Congress in the determination of what constitutes "commerce" legislation, the only meaningful protection from government tyranny that the citizens may enjoy are those activities that happily fall within the protective sphere of the Bill of Rights or that comport with this Court's concept of what is encompassed in the idea of "liberty" under the Fourteenth Amendment. But it cannot credibly be contended that the Framers of the Constitution were more concerned about government incursions

into the spheres of activity protected by the Bill of Rights, which were amended to the original Constitution, than government attempts to exercise authority in excess of powers enumerated in the original text of that document.

Accordingly, though this Court may construe the grant of authority under the Commerce Clause as having broad limits, it must be decisive when Congress has breached those limits. The Violence Against Women Act constitutes such a breach.

CONCLUSION

While it can be readily conceded that the term "commerce" is susceptible of a broad interpretation, and that a "bright line" rule for deciding Commerce Clause cases may be elusive or nonexistent, the lack of a bright line has never prevented this Court from exercising its judgment with respect to even more amorphous concepts, such as "liberty." *Compare, e.g., Roe v. Wade, supra*, and *Griswold, supra* (finding liberty interests in obtaining an abortion and using contraceptives), *with Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no constitutional liberty interest in a right to assisted suicide). But even granting the delicate nature of the task, there is no escaping the conclusion that any conceivable line of demarcation will not merely be blurred, but utterly obliterated, if this Court solemnly concludes, as a matter of constitutional interpretation, that "gender-motivated" violence is a proper subject of the federal power "[t]o regulate commerce . . . among the several states."

This Court must draw some line, and that line must be founded upon a functional concept of what is encompassed by the term "commerce" in Article I, Section 8, Clause 3. Further, the line must be drawn by this Court's informed understanding of what the term means, without undue deference to legislative determinations. And finally, that line cannot possibly be drawn so indiscriminately that it can encompass the conduct of gender-motivated violence within the realm of "commerce."

For the foregoing reasons, the decision of the court below should be AFFIRMED.

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Respectfully submitted,

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